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No. 01-1477

In the Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.,
PETITIONERS

v.

MCI TELECOMMUNICATIONS, ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a State waives its Eleventh Amendment immunity from suit by voluntarily assuming regulatory authority under the Telecommunications Act of 1996.

2. Whether individual members of a state public utility commission may be sued in federal court under the doctrine of *Ex parte Young* for alleged ongoing violations of federal law in performing federal regulatory functions under the Telecommunications Act of 1996.

3. Whether federal courts may apply a *de novo* standard of review to state public utility commissions' legal determinations under the Telecommunications Act of 1996.

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OPINIONS BELOW

The opinion of the court of appeals in *MCI Telecommunications Corp.* v. *Bell Atlantic-Pennsylvania* (Pet. App. 1a-54a) is reported at 271 F.3d 491. The opinion of the court of appeals in *Bell Atlantic-Pennsylvania* v. *Pennsylvania Public Utility Commission* (Pet. App. 55a- 66a) is reported at 273 F.3d 337.

JURISDICTION

The judgments of the court of appeals were entered on November 2, 2001. A petition for rehearing in *MCI Telecommunications* was denied on January 4, 2002, and a petition for rehearing in *Pennsylvania Public Utility Commission* was denied on January 15, 2002 (Pet. App. 67a-68a, 70a-71a). The petition for writs of

certiorari was filed on April 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. 251 *et seq.*) "created a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 122 S. Ct. 1753, 1756 (2002). Among other things, the 1996 Act requires incumbent local exchange carriers to enter into agreements with competitors concerning interconnection with, and access to elements of, the incumbent's network. The 1996 Act permits state public utility commissions to exercise certain regulatory authority respecting such interconnection agreements, including the authority to arbitrate, approve, and enforce them. See, *e.g.*, 47 U.S.C. 252(b) and (c) (arbitration); 47 U.S.C. 252(e)(1)-(4) (approval or rejection); *Verizon Maryland*, 122 S. Ct. at 1758 n.2 (enforcement).[1] If a state commission elects not to exercise such authority, the Federal Communications Commission (FCC) acts in its stead. 47 U.S.C. 252(e)(5).

2. Respondent MCI Metro Access Transmission Services (MCI) and other prospective entrants into local telecommunications markets in Pennsylvania sought to enter into interconnection agreements with respondent Verizon Pennsylvania (then Bell Atlantic-Pennsylvania), the incumbent local exchange carrier. Although the parties attempted to agree on terms of access through negotiation, they were unable to resolve all issues. MCI and other parties to the agreement

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[1] All citations of provisions of the 1996 Act are of the 1999 Supplement to the United States Code.

asked petitioner Pennsylvania Public Utility Commission (PPUC) to resolve the open issues. Pet. App. 2a.

The PPUC elected to exercise regulatory authority under the 1996 Act. The PPUC arbitrated the open issues and required revision of the interconnection agreement. MCI and Verizon filed the revised agreement and requested the PPUC's arbitration of one remaining issue. The PPUC arbitrated that issue, required further revision of the agreement, and conditionally approved it. Pet. App. 2a, 9a.

MCI filed suit in the United States District Court for the Middle District of Pennsylvania, seeking review of the PPUC's order and naming as defendants the PPUC, its commissioners in their official capacities, and Verizon Pennsylvania. Verizon Pennsylvania filed a counterclaim and a cross-claim. The telecommunications companies alleged that certain portions of the arbitrated interconnection agreement did not comply with the requirements of the 1996 Act. Pet. App. 2a-3a, 9a.

The PPUC and its commissioners moved to dismiss on various constitutional grounds, including that they were immune from suit under the Eleventh Amendment. The United States intervened to defend the constitutionality of the 1996 Act. Pet. App. 3a, 9a-10a.

The district court denied the motion to dismiss. Subsequently, the court issued a decision on the merits, affirming the PPUC's orders in part and reversing in part, and remanding to the PPUC for further proceedings. Pet. App. 3a, 10a-11a.

3. Meanwhile, two groups of carriers filed competing petitions with the PPUC concerning, among other issues, the pricing determinations made in the earlier interconnection agreement. The PPUC issued a Global Order disposing of multiple issues. Pet. App. 57a.

Verizon Pennsylvania filed suit in the United States District Court for the Eastern District of Pennsylvania, asserting that portions of the Global Order violated the 1996 Act. It named as defendants the PPUC and its individual commissioners in their official capacities. Pet. App. 58a.

The PPUC and its commissioners moved to dismiss the suit on various grounds, including Eleventh Amendment immunity. MCI and other private parties intervened to file cross-claims and counterclaims against Verizon Pennsylvania, and three state senators intervened to support the PPUC's position on Eleventh Amendment immunity. The United States intervened to defend the constitutionality of the 1996 Act. Pet. App. 58a.

The district court denied the motion to dismiss in all respects. Pet. App. 58a.

4. The United States Court of Appeals for the Third Circuit affirmed the district courts' determinations in both cases that the PPUC and its commissioners are not entitled to Eleventh Amendment immunity from suits challenging their determinations under the 1996 Act. On the merits, the court of appeals affirmed in part and reversed in part in the case from the Middle District of Pennsylvania. The court of appeals held that it did not have appellate jurisdiction to review other aspects of the case from the Eastern District of Pennsylvania.

a. The court of appeals rejected the PPUC's and its commissioners' claim of Eleventh Amendment immunity on two alternative grounds. See Pet. App. 21a-33a (appeal from Middle District of Pennsylvania); *id.* at 60a (incorporating same reasoning in appeal from Eastern District of Pennsylvania).

First, the court of appeals held that Pennsylvania, by electing to exercise regulatory authority under the 1996 Act, waived the PPUC's immunity from such suits. Pet. App. 23a-28a. The court of appeals reasoned that the opportunity to regulate local telecommunications competition under the 1996 Act is a "gratuity" that Congress could offer to the States on the condition that they waive their sovereign immunity. *Id.* at 23a-25a. The court of appeals observed that a State's participation in the regulatory scheme is "voluntary," because a State "may simply decline the invitation to regulate local competition on behalf of the federal government and allow that power to return to the FCC." *Id.* at 27a. The court of appeals determined that 47 U.S.C. 252(e)(6), which provides for federal district court review of state commission decisions under the 1996 Act, is sufficiently clear to give States notice that their public utility commissions may be made parties to such proceedings. Pet. App. 27a-30a.

Second, the court of appeals held that the PPUC commissioners, in their official capacities, are subject to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to the extent that their decisions with respect to interconnection agreements are alleged to violate the 1996 Act. Pet. App. 30a-33a. The court of appeals reasoned that such suits seek to enjoin an ongoing violation of federal law because interconnection agreements "continue to govern the current and future relations among the telephone carriers" until they are superseded by later action by the state commission. *Id.* at 31a. The court of appeals concluded that such suits do not present the special circumstances that militated against *Ex parte Young* actions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Pet. App. 32a-33a.

b. The court of appeals held that the PPUC's legal determinations under the 1996 Act are reviewable *de novo*, while its factual determinations are reviewable for substantial evidence. Pet. App. 34a-36a. In rejecting the PPUC's argument that its interpretations of the 1996 Act should be reviewed under the deferential standard articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984), the court of appeals observed that Congress delegated to the FCC, not to the state commissions, the authority to fill gaps in the 1996 Act through binding rulemaking. The court of appeals suggested that conflicts could arise if both the FCC and the state commissions were entitled to deference in their interpretation of the 1996 Act. Pet. App. 35a-36a.

c. The court of appeals affirmed most aspects of the decision from the Middle District of Pennsylvania with respect to the interconnection agreement arbitrated and approved by the PPUC. The court of appeals agreed with the district court that the PPUC erred in requiring MCI to interconnect with Verizon's network at each access tandem serving area, see Pet. App. 37a-38a; that the PPUC did not err in permitting MCI to collocate remote switching modules in Verizon's offices, see *id.* at 38a-41a; and that the PPUC erred in requiring Verizon to provide directory publishing services to MCI at wholesale prices, *id.* at 42a-44a. The court of appeals reversed the district court on two issues, holding that the PPUC's wholesale rates for services sold to MCI for resale are "inconsistent with the language of the [1976] Act," *id.* at 42a, and that the PPUC's prices for network elements should be evaluated by the district court for "whether [they] comport with the [1996] Act," *id.* at 47a.

d. The court of appeals dismissed, for want of appellate jurisdiction, the PPUC's other challenges to the decision from the Eastern District of Pennsylvania with respect to the Global Order. The court of appeals held that the district court's denial of the PPUC's motion to dismiss on res judicata and statute of limitations grounds was not reviewable under the collateral order doctrine. Pet. App. 60a-65a.

ARGUMENT

The petition for certiorari presents three questions, two of which are virtually identical to those presented in *Verizon Maryland Inc.* v. *Public Service Commission*, 122 S. Ct. 1753 (2002). This Court's decision in *Verizon Maryland* is dispositive as to those questions. The third question, which concerns the standard of review of a state commission's interpretations of the 1996 Act, does not implicate any conflict among the circuits or otherwise warrant the Court's review. The petition should, therefore, be denied.

1. Petitioners contend that the court of appeals erred in holding both that Pennsylvania waived its sovereign immunity from suits challenging the PPUC's exercise of regulatory authority under the 1996 Act (see Pet. 12-22), and that the PPUC commissioners are amenable to suits for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), to challenge their decisions with respect to interconnection agreements as contrary to federal law (see Pet. 22-27). As petitioners concede (Pet. 12), those sovereign immunity questions are "substantially similar" to the sovereign immunity questions in *Verizon Maryland*, which was decided after the petition for certiorari was filed in this case. See PPUC Amicus Br. at 2, *Verizon Md.*, *supra* (acknowledging

the "similar[ity]" of the sovereign immunity questions in the two cases).

In *Verizon Maryland*, this Court held that state public utility commissioners are amenable to suit under the *Ex parte Young* doctrine to assure that their decisions with respect to interconnection agreements are consistent with the 1996 Act and other controlling federal law. See 122 S. Ct. at 1760-1761. In light of that holding, the Court concluded that it did not have to decide whether a State waives its sovereign immunity by voluntarily participating in the regulatory scheme established by the 1996 Act. See *id.* at 1760.

The Court's holding in *Verizon Maryland* with respect to the *Ex parte Young* doctrine is equally applicable here. In both cases, telecommunications carriers sued all of the members of a state public utility commission, in their official capacities, seeking declaratory and injunctive relief from a decision that was alleged to violate the 1996 Act. While this case involves a challenge to the state commission's decision approving a new interconnection agreement, whereas *Verizon Maryland* involved a challenge to a state commission's decision construing and enforcing an existing interconnection agreement, that difference has no bearing on the applicability of the *Ex parte Young* doctrine.

Here, as in *Verizon Maryland*, there is no need to reach the question whether a State waives its immunity from suit by electing to exercise regulatory authority under the 1996 Act. Because a party who contends that a state commission has issued an order contrary to the 1996 Act may seek relief in an *Ex parte Young* action

against the individual commissioners, the party need not also seek relief against the state commission itself.[2]

2. Petitioners also contend (Pet. 27-29) that the court of appeals erred in declining to accord *Chevron* deference to the PPUC's interpretations of the 1996 Act. Every court of appeals that has addressed the question has held, consistent with the Third Circuit here, that state commissions' interpretations of the 1996 Act are reviewable *de novo*. See *U.S. West Communications, Inc.* v. *Sprint Communications Co.*, 275 F.3d 1241, 1248 (10th Cir. 2002); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 482 (5th Cir. 2000); *GTE South, Inc.* v. *Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *U.S. West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999), cert. denied, 530 U.S. 1284 (2000).

The Third Circuit's decision to apply the *de novo* standard is correct. There is no indication that

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[2] Petitioners contend (Pet. 26-27), in passing, that 47 U.S.C. 252(e)(4), which gives the district courts exclusive jurisdiction over suits seeking review of state commission decisions approving or rejecting interconnection agreements, violates the Commerce Clause. Petitioners did not challenge the constitutionality of Section 252(e)(4) in the court of appeals (except for a single sentence in their reply briefs), and the court of appeals did not address any such challenge. Nor is a challenge to Section 252(e)(4) encompassed within the questions presented in the petition. See Pet. (i). The Court ordinarily does not consider claims raised in such circumstances. See Sup. Ct. R. 14.1(a); *Jones* v. *United States*, 527 U.S. 373, 394 n.11 (1999) (declining to address claim outside questions presented in petition); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to address claim not raised in, or addressed by, the court of appeals). In any event, petitioners do not identify any case that has questioned the constitutionality of Section 252(e)(4) under the Commerce Clause, and we are aware of no such case.

Congress contemplated that state commissions would, like the FCC, be entitled to deference in filling gaps in the 1996 Act. See Pet. App. 35a; *GTE South*, 199 F.3d at 744. *De novo* review of state commissions' interpretations of the 1996 Act promotes uniformity in federal law, and avoids tension or inconsistency between the FCC's interpretations and those of the state commissions. See Pet. App. 35a-36a; *AT&T Communications of the South Cent. States, Inc.* v. *BellSouth Telecomms., Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998) ("[G]iving deference to state commission determinations might only undermine, rather than promote, a coherent and uniform construction of federal law nationwide.") (quoting *U.S. West Communications, Inc.* v. *Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997)). There is thus no need for this Court to review the courts of appeals' consistent treatment of the question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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